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No. 80-2101

Supreme Court of the United States

October Term 1980

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Brief of J.O.L. II in Opposition to the Petition

(a) does not dispute the nature of the important issues presented by petitioner relating to divorced parents subject to adoption laws that permit the permanent severance of the parent-child relationship on best interests standards, although there is no showing of unfitness, abuse or abandonment;

(b) does not dispute the statement of facts essential to the cause;

(c) does not dispute the actual nature and the argued effect of the opinions below as not altering the legal conditions that earlier existed at the time this Court granted the Petition in Petition No. 80-45;

(d) does not address the pertinent standards and references in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 547 (1976), or County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), referred to in our Petition at p. 22;

(e) does not address the application of those standards, duly noted in our Petition, showing that by the next time there is full plenary review of the pending remand, it is probable that at least the eldest child (Mr. Johnson's daughter) will have reached majority; so that, as to her, the cause will be said to be truly moot (for as shown in the original granted Petition, that daughter, Judith, born in October 1964 will be 18 in October 1982, Petition No. 80-45, p. 7, W.Tr.5);

(f) ignores the point that the trial court cannot declare the unconstitutionality

of the statute, whether facially or as applied to Mr. Johnson, or the invalidity of the continuing authority on which our vacated appellate case was based;

(g) avoids the fact that In the Matter of Petition for Adoption of J.S.R., D.C. App., 374 A.2d 860 (1975), which earlier established the constitutionality of the statute, its standards and the procedures used here to the father's deprivation, remain the law; and by ignoring it, the Opposition avoids reaching the point that only the Court of Appeals could have effected that change on the matters before it after this Court's remand;

(h) does not address the fact that the effects of the prior adjudications either in fact cannot be "irrevocably eradicated" (the test in County of Los Angeles v. Davis) without a ruling on the

constitutionality of the adoption law or application of its "best interests" standards to divorced parents who are not unfit or abusive, in order for Mr. Johnson to have the necessary predicate for his declaratory claim and further relief;

(i) has completely shifted the ground of the Opposition made and urged to this Court at the time of its Motion to Dismiss in No. 80-45 and to the Court of Appeals thereafter --- mootness allegedly arising because Respondent stated he would consent to the vacating of the adoption order --- a ground he now appears to concede does not apply in the light of the failure of the Court of Appeals to address the ruling in J.S.R., supra, nor what is "live" as a predicate to full relief; instead, he now shifts to a claim that the new Petition should be denied because it is premature.

While he admits that Mr. Johnson

raised the issues asserted, Respondent J.O.L. now urges that they involve a "premature and unnecessary adjudication", Brief in Opposition p. 3.

No one disputes the general abstract principle that this Court will avoid premature rulings or "advisory" rulings.

While the principle is not in doubt, it is simply not at all applicable to these facts.

The trial Court cannot rule --- either in fact or in time for plenary review before Judith becomes 18 --- on the critical constitutional issues that are necessary for full relief.

Voluntary cessation or agreement now to the vacating of the adoption order neither affords full direct nor declaratory relief that may or will irrevocably eradicate the unconstitutionally-imposed

actual past effects and threats of effects.

And before there is full plenary review, even if the trial court went beyond its power, one child would reach 18.

This record, after the inaction of the Court of Appeals, therefore, shows neither mootness nor prematurity, but a live controversy that is not hypothetical and not "advisory".

See Bellotti v. Baird, 428 U.S. 132, N. 7(1976) (termination of pregnancy does not moot the constitutional issue); see also Nebraska Press Assn. v. Stuart and County of Los Angeles v. Davis supra. Compare also, Hutchinson v. Proxmire, 443 U.S. 111 (1979) where this Court recognized and addressed the issues urged because it was clear what would occur at the appellate level if it did not do so --- a likely ruling not addressing the issues

pressed and more delay. That is the condition here. See also Storer v. Brown, 415 U.S. 724, 738 fn. 8 (1974).

Putting aside how much this new shift from alleged mootness to "prematurity" reflects on Respondent's good faith; putting aside what the Opposition omits to address or ignores; putting aside the fact that all our issues were raised before the Court of Appeals in our Opposition to the Motion to Remand as well as the contemporaneously-filed Suggestion for an En Banc Hearing (to deal with claims of facial unconstitutionality of the statute or as to its applied unconstitutionality to clarify or limit its prior J.S.R. standards rulings); putting all this to the side, as matters now stand, it is neither a hypothetical nor speculative fact, but an undeniable fact that the trial court still has before

it the same unchanged statute, the same D.C. Court of Appeals ruling that it is constitutional (In the Matter of Petition of J.S.R., D.C. App. 374 A.2d 860, 1977), the same claim for full relief that it had before the remand, and the same important questions about the rights of divorced parents under that best interests adoption statute where there is no showing of unfitness, abuse or abandonment.

Even if the trial court could grant much more than Respondent J.O.L. has said in his limited consent he would agree to (merely a vacating of the adoption Order), by the time of any probable full plenary review of that trial court action, Judith will have reached majority.

All Respondent need do, if the trial court went beyond its power or what would be its likely action on his limited consent, is to file an appeal to let that

short time run.

In sum, if this Court does not take review now, any meaningful right to "full plenary review" through the courts to eradicate the effects of the deprivation is theoretical at best --- because it will be said to be fully moot by October of next year as to one child.

The fact is that Respondent, J.O.L. is likely to appeal any trial court ruling that goes beyond his limited consent to the formal setting aside of the adoption Order.

Mr. Johnson is likely to appeal any ruling that is limited to it.

The critical fact, however, is that while this goes on, the children come closer to majority, all past lost time with the children and delays to the side.

Respondent J.O.L. delayed over three

and one-half (3-1/2) years up until this Court granted the writ and therefore until just before full plenary review in this Court, before offering to consent to the vacating of the adoption decree.

By now, it is far more probable than not that any appeal of any ruling by either party in the present circumstances (with the statute still unaffected, J.S.R. still the local law and full relief at issue) will not be concluded much earlier than before (three and one-half years); at the very least, it is almost certain that full plenary review and the consideration of methods to eradicate the effects of the unconstitutional statute and its standards (see Nebraska Press Assn. v. Stuart and County of Los Angeles v. Davis, supra) will not occur before next October.

That is not a speculative fact but a probable event.

There is nothing hypothetical in the prior delay and the permanently lost parental rights.

There is nothing advisory about the existing law and statute that the D.C. Court of Appeals refused to address, nor the claims in that Court, as in our Opposition in this Court, that that law, on remand, was an obstacle to full relief.

There is nothing speculative about the likelihood that real mootness may arrive while plenary review continues if the matter is left with the lower court.

When this Court vacated the judgment in this case last November, its references did not mean that the District of Columbia Court of Appeals was to be no more than a conduit for a pass-through ruling

to the lower Court without its addressing the existing law and statute, each unaffected by this Court's action in vacating the judgment; and thus, an obstacle to full declaratory and damage relief.

The D.C. Court of Appeals, however, clearly viewed itself in that capacity; stated nothing about the effect of J.S.R. and the statute on full relief; and thus, in responding to this Court's order vacating its judgment, did so wrongly.

Our Petition should be granted or the prior-granted Petition in No. 80-45 reinstated.

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